

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1503

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

vs.

GLENN BANKS

Defendant-Appellant

Appeal from the United States District Court For The
Western District of New York

BRIEF FOR DEFENDANT-APPELLANT

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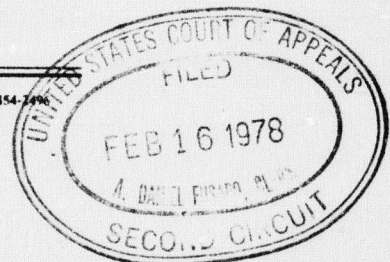


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Defendant-Appellant

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Western District of New York rendered by Hon. John T. Elfvin, United States District Judge, on November 7, 1977, following a jury trial, convicting the Appellant of three felony counts of knowingly acquiring and possessing Food Stamp Coupons having a value in excess of \$100.00 in a manner not authorized by Chapter 51 of Title 7 of the United States Code or the regulations issued pursuant thereto, in violation of Title 7, United States Code, Section 2023 (b). The Appellant was sentenced to three years' probation to be served concurrently under counts two, three and four of the indictment and to a fine of \$1,800.00 under count four of the indictment. The Appellant had been acquitted by the jury under the first count of the indictment which charged a violation of the same statute. The District Court has stayed

the sentence pending the disposition of this appeal.

STATEMENT OF ISSUES

I

Whether the case should be remanded to the District Court for an evidentiary hearing to determine whether the Appellant's rights under the Fourth, Fifth and Ninth Amendments to the United States Constitution were violated by the agents of the Government and to determine the Appellant's motion for the suppression of evidence and for the return of seized property.

II

Whether this is an appropriate case in which this Court can apply the Due Process theory of entrapment recognized in United States v. Russell 411 U.S. 423 (1973) and in United States v. Archer 486 F 2d 670 (2d Cir. 1973) and dismiss the indictment.

III

Whether the District Judge committed reversible error in his instruction to the jury on the issue of continuing entrapment and in denying the Appellant's motions for acquittal and to set aside the verdict based upon such grounds.

STATEMENT OF FACTS

The Background to the Case

To aid the Buffalo area in its recovery from the devastating blizzard which struck in late January, 1977, President Carter declared the area eligible for Federal disaster relief thereby rendering many of its citizens eligible for extraordinary issues of Food Stamps. While the relief program was being implemented, certain public officials became aware of allegations that a "black market" in Food Stamps was operating in the area. The source of this information was apparently unsubstantiated news media reports. (Appendix 5). The record contains no details about the "black market" nor does it suggest that the Appellant was at all involved in it, or otherwise then or previously engaged in any criminal activity.

The Government's Response

In response to this information William Shortall, a Special Agent from the Office of Investigation of the United States Department of Agriculture, was sent to Buffalo to direct an investigation. After his arrival an investigation team was formed which included personnel from the Department of Agriculture, the United State Attorney's Office and the Erie County Sheriff's Department.

In addition to manpower, the Department of Agriculture also provided monetary support for the investigation in the form

of specially issued Food Stamps eventually totaling over \$60,000.00 in value and cash to pay "informants" eventually totaling \$6,000.00. The Department also provided technical assistance in the form of portable recording devices and photographic services.

The Sheriff's Department provided Santo Costantino, Vincent Costanza, Joseph Petronella and other members of its narcotics squad, plus two of its drug "informants" or "confidential aides", Robert Gray and James Riley. These men were to perform the actual "leg work" in the investigation.

The Government's Plan of Action

Deputy Petronella was to ferret out the "black market". He was "to work in an undercover capacity to sell food stamps for cash or property, goods." (Appendix 28). Gray and Riley were to be used by Petronella "for the introduction of individuals that I would purchase money from for food stamps or products." (Appendix 28).

The plan was placed into operation in late February, 1977, and continued until March 11 when twelve men who had made purchases during the period were arrested. (Appendix 59). Each day, around noon, Investigator Shortall, the Sheriff's officers and the "informants" would meet at the Armory Tavern for lunch and then take to the streets. Plans for the day's

activities were developed in the field as they went from place to place. (Appendix 81). The technical aspects of the investigation included tape recording the actual sales, photographing some of the transactions and "dusting" the Food Stamps with a flourescent powder visible only under a special light to show who had handled the stamps. (Appendix 54-55).

One of the purposes of the plan was to find purchasers for food stamps and then to arrest and prosecute those persons to whom Petronella was able to sell stamps. Although he considered both buyers and sellers to be necessary to a "black market" Petronella looked for no sellers, only buyers. In all but one of the twelve cases which resulted in arrests, Petronella made multiple sales to each purchaser for the acknowledged purpose of building a case against them. In Appellant's case Petronella acknowledged that the first sale served as a "stepping stone" to the later sales. (Appendix 58-62). There were some attempted sales which were not consummated. (Appendix 13).

The "Informants"

Robert Gray and James Riley had worked as "confidential aides" or informants for Deputy Petronella in drug cases extensively in the past. The destiny of both became enmeshed with Petronella after they sold heroin to him in 1973-1974, in his undercover capacity, and they were subsequently indicted and convicted of Class A-III felonies under New York State law.

Due to the intervention of Petronella each was granted lifetime probation rather than receiving indeterminate-to-life jail terms possible under the strict New York drug laws. In exchange for Petronella's intervention Gray and Riley promised their "co-operation" to the Erie County Sheriff's Department and Petronella. (Appendix 68-78).

The Compensation of the "Informants"

The United States Department of Agriculture, through the Erie County Sheriff's Department, paid Riley thirteen hundred dollars and Gray eight hundred dollars at the end of the approximately two weeks each spent in the investigation. (Appendix 2). Upon direct examination by the United States' Attorney Chief Investigator Shortall testified as follows:

(BY MR. WAGNER)

* * *

Q. Now, when you say you had money for informants, do you know what the arrangement was with the informants?

A. The Sheriff's Office had confidential informants and if the information which they supplied turned out to be of value, they were to be paid, there was no fixed or flat rate but a reasonable amount of money for their efforts during the time they had spent, and so on. (Appendix 1).

The foregoing was developed on cross-examination as follows:

(BY MR. HILL)

* * *

Q. You testified that these informants were going to be paid if their information was of value, is that right?

A. Yes, sir.

Q. And by being of value don't you mean if it resulted in actual arrests?

A. Basically, yes.

Q. And is it correct that the more valuable that an informant's information was the more the informant would be paid?

A. Yes, in affect. (sic).

Q. In other words, the more successful he was at supplying information or leads that would result in arrests the more money he would make?

A. And the more time and the more effort expended and the greater number of cases would be--the reimbursement would be commensurably higher.

(Appendix 20-21).

The indictment against the Appellant and
the nature of his defense.

The March, 1977, session of a Grand Jury empaneled in the Western District on June 8, 1976, indicted Glenn Banks for four felony counts of knowingly acquiring and possessing Food Stamp Coupons having a value in excess of \$100.00 in an unauthorized manner in violation of Title 7 United States Code, Section 2023 (b). The substantive basis for the indictment was alleged to be purchases of food stamps from Joseph Petronella on February 25th, February 28th, March 7th and March 11th, 1977.

From the outset the defense unequivocally conceded that Mr. Banks had made the purchases as alleged but maintained that he was entrapped into doing so. (Appendix 171-173). No other basis of defense was advanced.

The jury acquitted Mr. Banks on the first count of the indictment covering the first in the series of sales, but convicted him on the other three counts, each involving one of the three subsequent sales. (Appendix 184-185).

The incidents of the first sale.

In the late afternoon of Friday, February 25, as the Sheriff's undercover team drove about the City, Robert Gray told Deputy Petronella "to pull up in front of Harris Hardware on Ferry near Waverly Street." (Appendix 31). Harris Hardware

was the business owned and operated by Appellant, Glenn Banks, and his wife Barbara over a period of seven years. Mr. Banks is a forty-year-old black man, born and raised in North Carolina, educated to the Ninth Grade, a fifteen-year resident of Buffalo, the father of eight children and without a history of criminal involvement. (Appendix 105-106). Mr. Banks produced evidence (1) of his good reputation for being an honest person.

Upon pulling up in front of the store, Gray got out of the car and went inside the store alone. Several minutes later he came outside and signalled Petronella to come in. (Appendix 31, 84). Once inside Petronella was advised by Gray that Mr. Banks would purchase Food Stamps having a face value of \$1,000.00 for \$300.00 and the sale was then consummated. (Appendix 218). Although the portion of the transaction involving Petronella was recorded via a body recorder which he wore concealed under his fur coat, the events and conversations between Mr. Banks and Gray before Petronella entered the store were not recorded.

As testified to by Mr. Banks and his employee, Miles Wirt, Gray, upon entering the store, told Mr. Wirt that he wanted to talk to "the boss." At that time Mr. Banks was waiting on a customer, and when he was finished he asked Gray if he could

(1) Four character witnesses testified in behalf of Mr. Banks. The testimony is not reproduced in the Appendix since it was of a general nature and amounted to the proposition that Mr. Banks had a favorable reputation for honesty in the community. (Transcript 327-342.)

help him. Gray replied by asking if he wanted to buy some Food Stamps and Mr. Banks said that he did not. Gray repeated his inquiry and Mr. Banks declined again. Gray persisted and said "wait a minute. You haven't heard the deal yet." He then said he wanted to sell \$1,000.00 worth of stamps for \$300.00. At about this point Mr. Wirt expressed an interest in buying some of the stamps. Mr. Banks asked if the stamps were "hot." Gray gave assurances that they were not and added that he worked at "the place." Gray finally added that he had to rid himself of the stamps because he was stranded and needed money so he could leave town. At the end of this conversation, Mr. Banks finally agreed to the purchase. (Appendix 107-108, 135-137, 142).

Gray then left the store and returned with Petronella. Mr. Banks expressed surprise at the appearance on the scene of a second man and Petronella expressed apparent misgivings of his own, but both were assured by Gray that everything was alright. (Appendix, *ibid.*). Mr. Banks managed to scrape together \$200.00 and Mr. Wirt contributed \$100.00 of his own, and the transaction was completed. They then divided the stamps between themselves with each later distributing them among members of their respective families. (Appendix 118, 136).

Gray was not called to testify and the Government did not controvert Mr. Banks' version of what transpired with Gray. It

is evident from the tape that was made by Petronella that Gray had actually gone beyond merely "introducing" Petronella to Mr. Banks and had arranged the sale, participated in it, and had moved it along. (Appendix 218). It is also evident from the tape that at least to Mr. Wirt's knowledge, Mr. Banks was not in the business of disposing of food stamps or other illicit merchandise.
(2)

The three subsequent transactions

Immediately upon the consummation of the first sale, Petronella began to lay the groundwork for the subsequent sales. Before he left the store the following colloquy took place:

PETRONELLA:

When do 'ya want me?

BANKS:

Huh?

PETRONELLA:

When do 'ya want 'ta see me?

(2) When Mr. Banks had temporarily left the presence of Mr. Wirt and Petronella, the following occurred:

* * *

PETRONELLA: There's a thousand dollars there. Is he gonna be able to get rid of 'em all?

MILES: Huh? (Appendix 220).

BANKS:

For more?

PETRONELLA:

Well I don't know. When will you sell these? When do you want em.

BANKS:

Ah, let me, let me see what happen first, um---

PETRONELLA:

Tomorrow?

BANKS:

No, tomorrow - - -.

PETRONELLA:

Monday. Monday. That's it for me.

BANKS:

Monday? Alright. Check with me Monday then.

PETRONELLA:

What time?

BANKS:

'Bout the same time.

PETRONELLA:

Alright who do I ask for or just ah - - -.

BANKS:

Well, you'll just see me here.

PETRONELLA:

OK, what time?

BANKS:

I'll be here. Any, anytime in the evening time, what what time is it now?

VOICE:

Six, six o'clock. (Appendix 218-222).

Mr. Banks testified that he was surprised at the offer of more stamps since he thought Gray was merely selling to raise funds quickly needed to leave the city. He did not really expect to see him again in any event. (Appendix 114-115).

Deputy Petronella testified that rather than wait until Monday, February 28th, he went back to the hardware store on Saturday, February 26th. Although he was wearing his recording device he did not know if a recording of what took place on that occasion existed. He said that Gray "may have" been with him. He did not know whether or not Gray had talked to Mr. Banks on the 26th or at any time when he was not present. Although initially denying any telephone contact with Mr. Banks between the 25th and the 28th Petronella ultimately acknowledged that his own intra departmental investigation memorandum showed that such had occurred although he could not "recall it". (Appendix 88-89).

Mr. Banks testified that sometime between the time of the sale and Friday the 25th and Monday the 28th Gray, not Petronella, returned to the store, said that Petronella had not given him his fair share of the stamp proceeds, said that he was sick and nagged him into giving him another \$50.00. Mr. Banks said that on this occasion Gray broached the subject of larger stamp purchases, saying that he had more stamps available on the same three-for-one basis up to \$20,000.00 or \$30,000.00 worth. Mr. Banks testified further that he replied he neither wanted nor needed any more stamps and Mr. Gray suggested he see if his friends needed some. Mr. Banks explained that he replied "I'll see" because he "had to give him an answer because I had-- I had got involved in the first purchase from him and now I had to give him an answer----." The visit ended when "a tall dark-haired fella dressed real nice" came to the door and called Mr. Gray. Gray said he would be "getting in touch". (Appendix 376-378).

According to Mr. Banks his next contact with Petronella was "early" on Monday the 28th, possibly via a telephone call in which Petronella asked if he had talked to anyone about buying \$3,000.00 worth of stamps, another amount mentioned by Gray previously. At that point Mr. Banks had on Saturday the 26th casually mentioned Gray's second visit to one Lattimore, while he was at Lattimore's store buying fish as was his custom.

Lattimore expressed an interest in such a purchase. (Appendix 379-380).

On Monday the 28th Lattimore brought Mr. Banks \$600.00 in cash to which Mr. Banks added \$300.00 of his own. When (3) Petronella and possibly Gray later appeared at the hardware store, after failing to appear earlier in the day, a sale of \$3,000.00 worth of stamps for \$900.00 was consummated after Petronella lured Mr. Banks outside where photographs were taken from a hidden location. (Appendix 14). Mr. Banks distributed his share among members of his family as he had in the first instance. (Appendix 125).

The third transaction which occurred on Monday, March 7, was also preceded by another unrecorded telephone call from Petronella to Banks. (Appendix 92). In this instance four black and white portable television sets were exchanged for \$1,040.00 in food stamps. Petronella described his telephone call:

"I had called Mr. Banks just to talk to him to make arrangements for the conclusion of the investigation and Mr. Banks had asked me for more stamps- - -and then Mr. Banks stated that he had lamps and small appliances and various other things that he would give me in return for stamps." (Appendix 92).

(3) Mr. Banks said Gray was present. Petronella could not recall whether he was present or not. (Appendix 121, 89).

Petronella could not recall if he negotiated the details of the exchange over the phone or after he went to the hardware store. (Appendix 251-253).

Mr. Banks testified also that the third transaction was preceded by a telephone call from Petronella. He testified that Petronella asked him if he could get some television sets and lamps, to which he replied that he could buy some television sets from his wholesaler but that they did not carry lamps. Petronella then offered \$2,000.00 worth of stamps for five television sets. Mr. Banks testified that he then contacted Mr. Lattimore, who provided \$500.00 to purchase the television sets. (Appendix 126-127). Mr. Banks testified that there was then another telephone call from Petronella by way of "reminder" after which he went to the warehouse and was able to purchase only four television sets. He documented his purchase on the day of the third sale with a receipt. (Appendix 127). He returned something in excess of \$100.00 to Lattimore. Upon returning to his store he received yet another telephone call from Petronella to verify that he had the sets. Shortly thereafter Petronella arrived at the store and the transaction was consummated. Banks gave Lattimore \$1,000.00 worth of stamps and used the remaining \$40.00 worth to purchase food for his employees. (Appendix 129-130).

At the conclusion of this third transaction Petronella mentioned that "they want stuff, anything they can sell". Petronella passed this off merely as "street talk", having previously denied he was hoping to uncover stolen merchandise. The television sets turned out to be legitimate. (Appendix 254-257).

Petronella testified that he next talked to Mr. Banks when he made another unrecorded telephone call to the hardware store. He described the substance of the conversation:

"I stated that Friday would be the last day I would be in town, and Mr. Banks stated to me that he would be interested in \$30,000.00 worth of food stamps - - -and the price was discussed. - - -I stated that I would have the \$30,000.00 in food stamps if Mr. Banks would have the money, he stated he would have \$9,000.00 - - -." (Appendix 45).

Mr. Banks testified that the purchase of such a large amount of stamps originated with his February 26th conversation with Gray and his subsequent conversation with Lattimore in which Lattimore indicated that he would be interested in a large purchase. (4) Lattimore provided \$7500.00 and Mr. Banks \$1500.00 toward the purchase price. The stamps were to be apportioned between the two of them with Mr. Banks intending to use his

(4) Agent Shorthall testified that the operator of a food store, such as Mr. Lattimore, could readily convert food stamps into cash, but that a person not having a food store account with the bank could not. (Appendix 11).

share for his own use and for the possible benefit of a community organization to which he belonged, but not for sale. (Appendix 132).

This fourth transaction was concluded outside Harris Hardware Store on March 11, 1977. As Mr. Banks returned to the store the Government's team followed on his heels, arrested him under the authority of a warrant which they had obtained based on the first three sales, and confiscated the food stamps involved in the sale. (Appendix 46-49).

ARGUMENT

Point I

SINCE THE DISTRICT COURT FAILED TO GRANT THE APPELLANT AN EVIDENTIARY HEARING ON HIS SUPPRESSION MOTION AND SUMMARILY DENIED THE MOTION, THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR SUCH A HEARING BECAUSE THE GOVERNMENT'S ACTIVITIES HEREIN WERE SUBJECT TO THE REQUIREMENTS OF THE FOURTH AMENDMENT BUT WERE CONDUCTED WITHOUT THE BENEFIT OF A WARRANT AND THERE HAS BEEN NEITHER A SHOWING THAT THERE WAS A CONSTITUTIONALLY PERMISSIBLE BASIS FOR DISPENSING WITH A WARRANT NOR PROBABLE CAUSE TO OTHERWISE SUPPORT THE GOVERNMENT'S ACTIVITIES.

Appellant's Motion

Prior to trial, Appellant filed a motion to suppress certain evidence and to secure the return of certain seized property. Mr. Banks alleged, inter alia, that the Government's plan of action in the Food Stamp investigation "including sending

either Riley or Gray, or both, into Buffalo's east side, predominately black community, to make random wholesale intrusions, without regard for constitutional restraints, upon persons living and working there, and to attempt to induce those persons to purchase food stamps which had been issued by the United States Department of Agriculture especially to implement the Governmental plan, with the intention to then formally charge, arrest and indict the purchasers so obtained." Appellant further alleged that he was one of the persons intruded upon in connection with this plan, that the Governmental intrusion was without the benefit of a warrant or probable cause or any other constitutionally permissible basis for invading upon the defendant or in any way interfering with his privacy or his right to be free from unreasonable searches and seizures and in a constitutionally unreasonable manner." The Appellant alleged that the Government's claimed justification for its investigation, according to unsubstantiated newspaper reports, was that it was aimed only at known sellers of stolen property or that the buyers approached the Government's undercover operative only after he "let it be known in various areas that he had food stamps available". Appellant alleged that the "approach" was made to him not by him, that he had never engaged in any kind of criminal enterprise and did not know Gray previously. Finally, Appellant

alleged that in a fortuitous meeting and conversation between his attorney and Gray, Gray had been unable to provide any details why he had approached Appellant to solicit the purchase of food stamps. Appellant asked, inter alia, for an evidentiary hearing to determine whether the Government "had any constitutionally cognizable basis for invading the defendant's rights under the Fourth, Fifth and Ninth Amendments to the United States Constitution". (Appendix--Affidavit and Supplemental Affidavit in Support of Motion for the Suppression of Evidence and for the Return of Seized Property.)

The Government neither filed a reply to Appellant's motion nor otherwise controverted his allegations. The District Court disposed of the motion without a hearing of any sort as follows:

"Incidentally, and I mention this because we are not going into details but, Mr. Hill, I have paid attention to the motion you did make and there are no findings of fact that I need to make in connection with it but taking everything you say to be true there is no reason for granting the motion and I deny it. You have an exception for the record." (Appendix 215-217).

Appellant's motion was renewed and summarily denied at the end of both the Government's and defense cases. (Appendix 146-165).

Implicit in the District Court's ruling on the motion is the proposition that the conduct of the Government's operatives in this case was not subject to the Fourth or Fifth Amendments. Appellant submits that this is incorrect, that observance of constitution restraints was required and that an evidentiary hearing should have been routinely granted to inquire into whether or not the Government's conduct met applicable constitutional standards. The specific issues to be resolved upon such a hearing would have included why a warrant was not obtained from an impartial magistrate authorizing the intrusions made by the Government when it approached citizens, particularly Appellant, to solicit the commission of a crime, and, if waiver of the warrant requirement was found to be constitutionally permissible, whether probable cause existed for the Government's intrusion in the case of Appellant.

Controlling constitutional principles.

The United States Supreme Court, speaking through Mr. Justice Frankfurter, in Wolf v. Colorado 336 U.S. 23 (1949) said: "The security of one's privacy against arbitrary intrusion by the police---which is at the core of the Fourth Amendment---is basic to a free society." 336 U.S. 23, 27. In Schmerber v. California 384 U.S. 757 (1966) the court wrote: "The overriding function of the Fourth Amendment is to protect

personal privacy and dignity against unwarranted intrusion by the State." 384 U.S. 757, 767. In Mapp v. Ohio 367 U.S. 643 (1961) the Court reaffirmed the seminal holding establishing this broad theory of the Fourth Amendment when Mr. Justice Clark wrote:

"Seventy-five years ago in Boyd v. United States---, considering the Fourth and Fifth Amendments as running 'almost into each other', on the facts before it, this Court held that the doctrines of those amendments 'apply to all invasions on the part of the Government and its employees on the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property---.

"The Court noted that 'constitutional provisions for the security of person and property should be liberally construed---. It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" Mapp v. Ohio 367 U.S. 643, 646-647 (1961).

The Supreme Court has made it clear that the Fourth Amendment confers personal rights not dependent upon consideration of the type of property invaded by the Government:

"The premise that property interests control the right of the Government to search and seize has been discredited---.

"We have recognized that the principal object of the Fourth Amendment is the

protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested upon property concepts." Maryland Penitentiary v. Hayden 387 U.S. 294, 304, (1967).

"For the Fourth Amendment protects people, not places." Katz v. United States 389 U.S. 347, 351 (1967).

Appellant is mindful that there are certain limited kinds of governmental "intrusions" upon or "invasions" of a citizen's privacy or dignity that do not constitutionally require the prior issuance of a warrant. However, there is a minimum constitutional standard which must be observed in every case, even those limited exceptions to the warrant requirement, if any particular intrusion or invasion is to pass constitutional muster:

"In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." Chambers v. Maroney 399 U.S. 42, 51 (1970); see also Almeida-Sanchez v. United States 413 U.S. 266, 270 (1973).

Analysis

The type of governmental activity alleged in Appellant's motion papers wherein Riley and Gray were sent "into Buffalo's east side, predominately black community, to make random wholesale intrusions---upon persons living and working there, and

to attempt to induce those persons to purchase food stamps--- with the intention to formally charge, arrest and indict the purchasers so obtained" is not necessarily exempt from the warrant requirement of the Fourth Amendment. This case does not involve an undercover officer working on the streets at his day-to-day routine duties being suddenly confronted by a spontaneous opportunity to sell contraband to a person reasonably believed to be a willing criminal. Rather, it involves an extensive governmental operation to try to ferret out a "black market" by instigating criminal conduct according to a well developed plan which could just as easily as not have included a component for applying to an appropriate Court for a warrant without the danger of time dissipating evidence. It is possible that if the Government were able to make a strong enough showing of probable cause to believe that a certain area of the City had become a hotbed of activity for the black-marketing of food stamps, a constitutionally valid "area search warrant" similar to that suggested for use in municipal code inspections in Camara v. Municipal Court 387 U.S. 523 (1967) could have been obtained. It has been suggested by at least one present member of the Supreme Court that such an "area search warrant" would be feasible in the criminal investigation context, at least in investigations involving "roving automobile searches in border

areas". Almeida-Sanchez v. United States 413 U.S. 266 (1973) (Mr. Justice Powell concurring). The type of operation launched by the Government in the Food Stamp investigation smacks of the warrantless "roving area searches" or "dragnets" disapproved in Camara and Almeida-Sanchez, supra, and in Davis v. Mississippi 394 U.S. 721 (1969). As the Government's investigation team went from place to place in the community, their activities were only "subject to the discretion of the officer in the field." Camara v. Municipal Court 387 U.S. at 532, see also Almeida-Sanchez v. United States 413 U.S. at 270.

However, assuming arguendo that it would not be possible to construct a feasible and meaningful warrant procedure for this type of an investigation and an exception to the warrant requirement could be constitutionally permitted the "probable cause--- minimum requirement for a reasonable search permitted by the Constitution" referred to in Chambers v. Maroney, supra, still applies. The Supreme Court has considered this standard to be applicable in a wide variety of factual contexts where the Government or police had not obtained warrants, including searches of motor vehicles, Chambers v. Maroney, supra, and Almeida-Sanchez v. United States, supra; municipal code inspections, Camara v. Municipal Court, supra, and See v. Seattle 387 U.S. 541 (1967); statutory periodic inspections of retail

liquor dealers Collonade Catering Corp. v. United States 397 U.S. 72 (1970); "investigatory detentions" to take fingerprints, Davis v. Mississippi, supra; "stop and frisk" situations Terry v. Ohio 392 U.S. 1 (1968), Sibron v. New York 392 U.S. 40 (1968), and drawing blood in driving while intoxicated cases, Schmerber v. California, supra.

The conduct of Gray, Petronella and the rest of the Government's investigatory team may have been more subtle or sophisticated than that in the foregoing array of cases but Appellant submits it is cut of the same cloth and subject to the same constitutional rules. The constant minimum requirement is a showing of probable cause by the Government for intruding upon the citizen involved in each case.

Appellant does not contend that the use of undercover operatives to induce criminal activity is per se in all cases unconstitutional. Appellant, however, does contend that, warrant considerations aside, unless the Government has probable cause to believe that the person whom it has picked out to approach with its inducements into criminal activity is predisposed to accept its inducements and that it is not merely setting a "trap for the unwary innocent" (see Sherman v. United States 356 U.S. 369, 372 (1957)), the Fourth Amendment has been violated and evidence of criminal activity so obtained should be suppressed.

Although the issue presented here appears to place this case into the mainstream of the aforementioned Fourth Amendment cases decided by the Supreme Court over the last decade or so, it does not appear that this issue has been presented to the Court.

The most similar case appears to be Lewis v. United States 385 U.S. 206 (1966) in which an undercover Federal narcotics agent by misrepresenting his identity and stating his willingness to purchase narcotics, was invited by Lewis to come into his home where a narcotics' sale was consummated. Lewis preceded Maryland Penitentiary v. Hayden, supra, and Katz v. United States, supra, and focused upon property rather than privacy interests, but it is nevertheless relevant to the present case. Lewis contended "that, in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation---" 385 U.S. 206, 208. Mr. Chief Justice Warren writing for the Court pointed out that:

"Both petitioner and the Government recognize the necessity for some undercover police activity and both concede that the particular circumstances of each case govern the admissibility of evidence obtained by stratagem or deception".
385 U.S. 206, 208.

The Court affirmed Lewis' conviction on the theory that he invited the undercover agent into his home to conduct the illegal narcotics business he customarily carried on there.

In the present case the undercover police operatives were not initially invited into the Appellant's hardware store. Nor is there any basis for implying such an invitation since Gray entered the store, not for business purposes, but to solicit the commission of a crime. The feature of the Lewis opinion that is of most interest in the present case however, is the following footnote appended to the controlling legal principle that "the particular circumstances of each case govern the admissibility of evidence obtained by stratagem and deception.":

"In oral argument before this Court counsel for petitioner conceded that information obtained by the agent in the course of his general undercover investigation, together with the subject matter of the first telephone conversation between the agent and petitioner, provided probable cause for believing that a narcotics offense would be committed in petitioner's home and, therefore, would have supported the issuance of a search warrant." 385 U.S. 206, 208 (n. 4).

That is what makes the present case essentially different from Lewis and that is what is at the heart of Appellant's contention. Lewis did not contend that the Government lacked probable cause to sic its undercover operative on him, and it appeared from the record that it had in fact such probable cause. There is nothing in the present record to indicate that the Government had any probable cause to believe that a crime

would be committed when its agents approached Mr. Banks on February 25, 1977.

Assuming arguendo that what is implied in Lewis is that where the Government has probable cause to believe that a citizen will be a willing participant in a criminal transaction upon mere solicitation, an undercover operative may approach the citizen and solicit him without first obtaining a warrant, the Government should be required to establish probable cause at a suppression hearing. Should the Government be able to remove its investigation from the warrant requirement of the Fourth Amendment but not establish probable cause the evidence gained from its intrusion upon Appellant's privacy should be suppressed. To hold otherwise would permit unrestrained activity by Government undercover agents, including untrained and unsavory types like Gray and Riley, and wholesale intrusions upon the privacy of unwary, innocent citizens. To say that these baseless expeditions might from time to time prove socially beneficial by ferreting out individuals ready to accept the Government's inducements is merely to state in another form the long rejected proposition that legal justification for an illegal antecedent search can be found in what it uncovers. See Henry v. United States 361 U.S. 98, 103 (1959).

Appellant respectfully submits that, should his conviction not be reversed and the indictment dismissed, this case

should be remanded to the District Court for a hearing to determine whether reason to except the activities of the Government in this case from the warrant requirement of the Fourth Amendment existed and, if so, whether the Government had probable cause to believe that Appellant would be predisposed to accept its inducement to illegally purchase food stamps before it approached him.

Point II

THIS CASE PRESENTS A CASE OF
GOVERNMENT INVOLVEMENT IN CRIME
UNDER SUCH CIRCUMSTANCES AND TO
SUCH A DEGREE THAT FIFTH AMEND-
MENT DUE PROCESS PRINCIPLES
SHOULD ABSOLUTELY BAR APPELLANT'S
CONVICTION AND THE INDICTMENT
SHOULD BE DISMISSED.

The United States Supreme Court and this Court of Appeals have on several occasions commented that there exists an entrapment theory based upon Fifth Amendment Due Process grounds which focuses on the conduct of the Government rather than on the predisposition of the defendant. Those Courts have, however, yet to consider a case in which it was appropriate or necessary to make a disposition based upon such a theory. See United States v. Russell 411 U.S. 423 (1973), Hampton v. United States 425 U.S. 484 (1976), United States v. Morrison 348 F 2d 1003 (2d Cir. 1965), United States v. Smalls 363 F 2d 417 (2d Cir. 1966), United States v. Cuomo 479 F 2d 688 (2d Cir. 1973), United States

v. Archer 486 F 2d 670 (2d Cir. 1973), United States v. Steinberg 551 F 2d 510 (2d Cir. 1977).

In Russell, supra, the Supreme Court reversed the Ninth Circuit Court of Appeals decision reversing a narcotics conviction which held that as a matter of law: "a defense to a criminal charge may be founded upon an intolerable degree of Governmental participation in the criminal enterprise." 411 U.S. 423, 424. The Supreme Court felt that the fact that a Government undercover operative supplied an otherwise available ingredient to an ongoing narcotics manufacturing operation conducted by Russell and others which the Government had learned about and had sent its agent to infiltrate was permissible Governmental practice. The Court found that: "The law enforcement conduct here stops far short of violating that 'fundamental fairness shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." 411 U.S. 423, 432. The Court noted that: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction,--the instant case is distinctly not of that breed." 411 U.S. 423, 431-432.

Elsewhere in its opinion the Court noted that: "Unlike the situations giving rise to the holdings in Mapp and Miranda, the Government's conduct here violated no independent constitutional right of the respondent." 411 U.S. 423, 430. In Hampton, supra, the Court held:

"The limitations of the Due Process Clause of the Fifth Amendment and those portions of the Bill of Rights which it has been held to incorporate, come into play only when the Government activity in question violates some protected right of the defendant." 425 U.S., 484 ---, 96 S.Ct. 1646, 1650 (1976).

In United States v. Cuomo 479 F 2d 688 (2d Cir. 1973) this Court of Appeals analyzed the applicable principles as follows:

"These arguments raise an issue akin to the issue raised by the defense of entrapment, but it differs from the entrapment defense issue in that it focuses only upon the propriety of the Government's conduct and does not involve factual issues relating to the predisposition of the defendants to commit crime." 479 F 2d 688, 691.

This Court indicated that the issue to be decided was:

"whether the prosecution's conduct is so 'shocking' as to constitute a violation of the defendant's right to due process." 479 F 2d 688, 692.

In Archer, supra, this Court again discussed this due process theory of entrapment but avoided relying upon it to

reverse the convictions before it, choosing to rely instead on a narrower ground and to: "leave the resolution of this difficult question for another day." 486 F 2d 670, 677. Appellant submits that the day for the resolution of that issue has come with this case. The facts in this case are different in some important respects from those in the foregoing cases.

The opinions in Russell, Hampton, Morrison, Smalls and Cuomo, supra, all indicate that the Government's undercover operatives merely infiltrated a pre-existing and on-going criminal enterprise and acted in concert with its members. It also is apparent in those cases that the Government had probable cause to believe that the defendants were engaged in an on-going criminal enterprise before its agents infiltrated it. As a consequence Fifth Amendments safeguards were not breached in those cases.

The present record contains no facts from which the Court could find that the Government undercover operatives merely infiltrated an on-going criminal enterprise when Gray approached Mr. Banks. To the contrary, it shows only that Mr. Banks was a person of good repute with no criminal history. Appellant submits that the record on this appeal supports only the conclusion that rather than ferreting out a "black market," the Government created one of its own by providing the sellers and

the contraband merchandise to be sold and, at least in Mr. Banks' case, selecting prospective purchasers at random without any rational or legal basis.

In Mr. Banks' case the record leads only to the conclusion that rather than catching a criminal the Government created one. Since the jury acquitted Mr. Banks on the count based upon the first sale the only rational conclusion is that they felt he was not a predisposed criminal merely waiting for an opportunity to commit a crime.

In Steinberg, supra, the INS agent legitimately went to defendant's place of business to investigate reports that illegal aliens were being employed there and then: "simply pursued and expanded on corrupt suggestions that were initially made by one of the defendants." 551 F 2d 510, 515. This "pursuit and expansion" which led to the charges on which appellants were ultimately convicted drew a stinging dissent from Judge Van Graffeland, but nevertheless the Government's conduct in approaching the defendant had a foundation in the reports of employment of illegal aliens such that it was arguably within due process bounds. In the present case even if Mr. Banks made "corrupt suggestions" after Gray and Petronella had whetted his appetite by the first sale, such suggestions were not made in the context of a legitimate Governmental contact in the first

instance. Even if it can be said that after the first sale Mr. Banks acted in concert with Gray and Petronella it ~~must~~ also be said that: "If there was a concert here, the Government agents were the conductors and the (defendant) responded to their persuasive batons." 551 F 2d 510, 520 (Justice Van Graffeland, dissenting).

In Archer this Court noted with disapproval that: "as far as appears, the instigators of the scheme had only a generalized belief that something was rotten in the Queens County District Attorney's Office." 486 F 2d 670, 675. In the present case the record does not even support a finding that there was some generalized belief about Mr. Banks' activities to serve as the basis for the Government's approach to him. Since there is absolutely no basis to even suggest probable cause for the Government's initial approach to him Mr. Banks Fourth Amendment rights were violated by the Government. (See Point I of this argument). The sine qua non for applying the due process entrapment theory to this case therefore is present. That is: "the Government activity in question violates some protected right of the defendant." Hampton v. United States 425 U.S., 484 96 S Ct. 1646, 1650 (1976). That being so, Appellant respectfully submits that the Government's activities in this case

have exceed the permissible limits to which the Government may go in conducting criminal investigations and that the indictment should be dismissed.
(5)

Point III

THE DISTRICT JUDGE COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE ISSUE OF ENTRAPMENT IN THE CONTEXT OF A CONTINUING COURSE OF GOVERNMENTAL CONDUCT AND ERRONEOUSLY DENIED APPELLANT'S MOTION FOR ACQUITTAL ON THE SECOND, THIRD AND FOURTH COUNTS OF THE INDICTMENT AFTER THE APPELLANT WAS ACQUITTED ON THE FIRST COUNT. IN THE POSTURE OF THIS RECORD THE INDICTMENT SHOULD BE DISMISSED RATHER THAN THE CASE BEING REMANDED FOR A NEW TRIAL BASED UPON PROPER INSTRUCTIONS.

Appellant requested in his requested instruction No. 6 the District Court to instruct the jury as follows:

"The indictment accuses the defendant of acquiring and possessing food stamps on four occasions between February 25, 1977, and March 11, 1977. Should you find that each of these acts was part of a course of conduct which was the product of the Government's initial inducement of the defendant,

- (5) United States v. Cuomo 479 F 2d 688 (2d Cir. 1973) indicates that this Fifth Amendment issue is "solely a question of law" that can be therefore considered even when raised for the first time on appeal. 479 F 2d 688, 692. However, Appellant raised the issue in the District Court via a request to charge which was denied (Appendix 225) and in his motion for acquittal at the end of the entire case (Appendix 165-170).

a separate inducement need not be shown for the later transactions in order for you to find entrapment with respect to them." (Appendix 224).

The requested instruction was a correct statement of the law.

Sherman v. United States 356 U.S. 369, 374 (1958). The District Judge ruled on the request as follows:

"Six is in in substance". (Appendix 226).

However, rather than phrasing his charge on the "course of conduct issue" in simple terms, the District Judge buried it in prolixity. (Appendix 174-175). This portion of the Court's lengthy charge, which covers approximately thirty-five pages in the record (Transcript 524-559), was preceeded and followed by instructions at several points to the effect that each of the four crimes charged in the indictment was a separate entity and had to be considered as such. (Transcript 526, 528, 543, 557).

It is obvious that the jury was confused by the Court's instructions on the matter because after it retired to deliberate it returned for further instructions on the issue. A lengthy colloquy took place between the Court and the foreman (Appendix 176-185). The essence of the jury's concern was:

THE FOREMAN:

If we found that he was entrapped on the first count now, that would not automatically exonerate him on

THE FOREMAN: (Continued)

the other three, they still would have to be judged separately? That's where our concern is. (Appendix 180-181).

Throughout this colloquy the Court persisted in prolixity. In the face of the jury's question and the Court's response Appellant requested an instruction that: "if they find entrapment as to the 25th they should find continuing entrapment as a matter of law as to the other three transactions." (Appendix 183). The request was denied. The jury then retired to deliberate and later returned with a verdict of "innocent" on count one of the indictment and guilty on counts two, three and four thereof (Appendix 184-185).

Subsequent to the verdict Appellant moved for acquittal on counts two, three and four of the indictment notwithstanding the verdict. (Appendix 186-200). After a relatively lengthy argument the Court reserved the decision and ultimately filed an opinion denying the motion. (Appendix 201-203). Appellant submits that the Court committed prejudicial error in its instructions to the jury and error in denying Appellant's post verdict motion. The basis for Appellant's contention in both instances is the same. The present record can only be rationally interpreted as showing a continuous course of conduct on the part of the Government. If Appellant was not predisposed to crime

on February 25th, (and the jury evidently believed he was not), any "predisposition" that he may have exhibited in the later transactions was necessarily a product of the incidents of February 25th. (6) All four incidents were linked not only by proximity in time but also, more importantly, by the on-going conduct of the Government from transaction to transaction. It is not disputed that immediately upon the consummation of the first sale Petronella immediately set up the second by his inquiry: "When do you want to see me?" Nor is it disputed by the Government that Petronella, if not Gray, returned to Appellant's hardware store before the second sale or that the second and third and third and fourth sales were linked by telephone calls initiated by Petronella to Mr. Banks. In short, once the Government's agents managed to set Mr. Banks in motion, they made sure he kept moving.

Appellant respectfully submits that rather than remanding the case for a new trial based upon proper instructions, the indictment should be dismissed, Appellant having been acquitted on the first count, since the only rational basis for the jury's verdict on that count is that the jury believed he was entrapped and since the record supports only the conclusion

(6) Upon oral argument of Appellant's post verdict motion United States Attorney appeared to concede that the jury did not find predisposition in the first instance. (Appendix 190-191).

that the later three transactions were a part of the course of conduct produced by the Government's initial inducement of Appellant and not independent from it.

CONCLUSION

Appellant respectfully submits that his conviction cannot merely be affirmed. Should the Court not find a sufficient basis in the arguments raised in Point II and Point III herein for reversing the judgment of the District Court, a remand is nevertheless required for an evidentiary hearing to develop the issues raised in Point I.

Dated: Buffalo, New York
February 6, 1978

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

-vs-

DOCKET NO. 77-1503

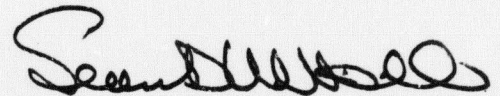
GLENN BANKS

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

SEAN D. M. HILL, being duly sworn, deposes and says:

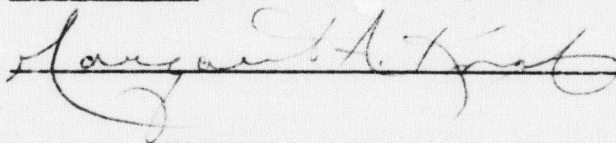
That, on the 8th day of February, 1978, he personally served the appellant's brief and appendix in the captioned matter upon EDWARD J. WAGNER, Assistant United States Attorney, by leaving three (3) copies thereof with his receptionist in the United States Attorney's Office, United States Courthouse, Buffalo, New York, 14202.



SEAN D. M. HILL

Sworn to before me this

22nd day of February, 1978.



MARGARET A. HILL
Notary Public, Western District of New York
Qualified in Erie County
My Commission Expires March 30, 1980

